Date: October 31, 1994

Case Number: 92-STA-12

In the Matter of

CLYDE ETCHASON

Complainant

v.

CARRY COMPANIES OF ILLINOIS, INC.

Respondent

APPEARANCES:

Kent Heller, Esq.
Heller, Holmes & Associates
Mattoon, Illinois
For the Complainant

Kathryn M. Hartrick, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
Chicago, Illinois
For the Respondent

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

This action arises under the Surface Transportation Assistance Act of 1982 (hereinafter "STAA"), 49 U.S.C. § 2305, and the regulations found at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

## STATEMENT OF THE CASE

The Complainant, Clyde Etchason (hereinafter "Etchason"), filed the first documented complaint in this action with the United States Department of Labor, Occupational Safety and Health Administration (OSHA) on May 21, 1991, alleging that the Respondent, Carry Companies of Illinois, Inc. ("Carry"), discriminated against him in violation of § 405 of the STAA.

Etchason contends that he was discharged by Carry on March 15, 1991 in retaliation for his filing of a complaint with the federal

Department of Transportation ("DOT") alleging that Carry's drivers were being forced to drive in violation of federal hours of service regulations[1]. Carry maintains that Etchason was terminated as a result of a series of infractions, culminating in an incident on March 14, 1991 where a Carry customer demanded that Etchason not be sent back to the customer's facility.

The Secretary of Labor, through a duly-authorized agent, investigated the complaint, and on December 18, 1991, determined that Etchason's complaint was without merit (Ad. Ex. 1)[2]. Etchason filed a timely appeal on January 13, 1992 (Ad. Ex. 2), and the matter was referred to this office for a formal hearing. A hearing was conducted before the undersigned in Cincinnati, Ohio on July 20 and 21, 1993, at which time the parties were afforded full opportunity to present evidence and argument.

## ISSUE

The sole issue to be determined in this matter is whether Etchason was discharged by Carry as a result of his having engaged in protected activity.

## STIPULATIONS

Pursuant to my prehearing order, the parties were instructed to confer and prepare a stipulation of facts which are not in dispute (Ad. Ex. 38). To that end, Etchason filed a Proposed Stipulation of Facts on July 12, 1993 (Ad. Ex. 43). Carry filed its own proposed stipulations as part of its pre-hearing submission on July 14, 1993 (Ad. Ex. 40), and also filed a Motion to Strike certain of Etchason's proposed stipulations on July 20, 1993 (Ad.

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[1] "Hours of Service" regulations, as used in this decision, are DOT limitations on the number of hours a commercial truck driver may operate his or her vehicle before stopping for rest. There are three main rules limiting a driver's hours. Briefly summarized, the "Ten Hour Rule" provides that a driver may accumulate a maximum of ten driving hours before stopping for eight hours of off-duty time; the "Fifteen Hour Rule" applies to time spent on duty, but not driving, such as loading, unloading, etc., and requires that a driver accumulate no more than fifteen "duty hours" (which include both driving and non-driving time) before stopping for eight hours of rest; and finally, the "Seventy Hour Rule" forbids the accumulation of more than seventy total duty hours in any eight day period. 49 C.F.R. § 395.3.

[2] In this decision, "Com. Ex." refers to Complainant's Exhibits, "Res. Ex." refers to Respondent's Exhibits, "Ad. Ex." refers to Administrative Exhibits, and "Tr." refers to the Transcript of the hearing.

Ex. 54). A comparison of the three documents reveals that the parties stipulated to the following facts:

1. That Clyde Etchason was employed by Carry;

2. That on or about February 1, 1991, Randy Tamminga, Carry's Vice President of Operations, recommended that Etchason be terminated;

3. That Randy Tamminga executed a document captioned "Carry Transit Incident Warning Notice" dated February 1, 1991, indicating that Etchason should be fired;

4. That Etchason filed an unfair labor practice charge against Carry with the National Labor Relations Board (NLRB) on or about April 3, 1991;

5. That the NLRB ruled against Etchason;

6. That Howard Hoving was, at all relevant times, the President of Carry; and,

7. That Carry terminated Etchason on March 15, 1991.

Based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing, and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Factual Background:

Carry Transit, a division of Carry Companies of Illinois, Inc., is engaged in the transportation of bulk food products throughout the United States (Tr. 294-95). As Carry is the owner of commercial motor vehicles used in an activity which affects interstate commerce, it is an "employer" subject to the employee protection provisions of the STAA. 49 U.S.C.A. § 2301 (Supp. 1994). Of Carry's approximately 400 employees, between 310 and 320 are drivers, who in turn are further broken down into groups consisting of local drivers, intermediate drivers, and long distance or over-the-road drivers (Tr. 295-96). Etchason applied for a position as an over-the-road driver on May 7, 1990, and was hired by Carry near the end of May, 1990 (Com. Ex. 15; Tr. 101).

#### 1. Employment Incidents:

During the nine and one half months he was employed by Carry, Etchason was involved in a variety of mishaps, the first of which

occurred on August 2, 1990. On that date, Etchason was making a delivery at Grey & Company when he scraped the landing gear of his trailer on the customer's asphalt driveway (Tr. 117-18). Carry's incident report concerning the event states that Etchason was entering the driveway from the wrong direction, and that he spilled some of the syrup he was delivering while disconnecting hoses (Res. Ex. 1). It further states that Etchason failed to notify Carry of the incident. Id.

Etchason admitted scraping the asphalt, but claimed that "only a handful" of asphalt was affected (Tr. 118). He further claimed that Carry had given him the wrong type of trailer for the delivery, which was the cause of the problem. Id. Etchason admitted that he did not report the incident to his dispatcher (Tr. 118-19).

Carry alleges that on August 10, 1990, a second incident occurred at Grey & Company, again involving a syrup spill by Etchason (Res. Ex. 2). Etchason flatly denies that such an incident ever occurred (Tr. 120). Randy Tamminga ("Tamminga"), Carry's Vice President of Operations, testified that on August 10, 1990, he received a call from Robert Tothe, the Shipping Superintendent at American Maize, Grey & Company's supplier, requesting that Etchason not be sent back to Grey & Company (Tr. 392-93). Tamminga followed up with Grey & Company, whose manager informed him that, in addition to the syrup spill, Etchason had scraped and cut the asphalt at Grey & Company on August 2, 1990 (Tr. 394). Tamminga testified that Etchason had not reported these incidents, and that Carry first learned of them when Mr. Tothe called to complain (Tr. 395).

However, there is an incident report filled out by dispatcher Steven Lay[3] dated August 4, 1990 (Res. Ex. 1), which undercuts Tamminga's assertion somewhat, and suggests that someone, albeit perhaps the customer, informed Carry of the earlier incident prior to August 10th. This apparent contradiction raises a related issue, the problematic nature of the "Incident Report" and "Incident Warning Notice" documents offered into evidence by Carry. Nine such documents were produced by Carry, only one of which contained Etchason's signature, despite the fact that five of the documents contained a signature line for the employee involved[4].

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[3] In the deposition of Mike Tallaksen, the dispatcher who filled out the August 2, 1990 incident report is referred to as Steve "Lake".

[4] Tamminga testified that the incident forms were changed in October, 1990, in order to provide a space for the employee's signature acknowledging receipt of the notice (Tr. 415). The forms themselves support his assertion. Compare Res. Ex. 3 (September

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Vague allegations were made by the Complainant that the notices were prepared after Etchason's termination, and then placed in his personnel file to justify his termination. I find no significant evidence in the record to support such a conclusion. However, as the documents are unsigned, they do not establish that Etchason received copies of the notices at the time of the events. Consequently, Etchason's knowledge of Carry's displeasure with his actions will be addressed in relation to each specific incident.

With regard to the incidents at Grey & Company, Etchason admitted that Tamminga discussed his scraping of the asphalt "two or three days" after the incident occurred (Tr. 119-120). He also stated that Tamminga asked him whether he had spilled syrup at Grey & Company, but that he denied any such spill (Tr. 120-21). There was some disagreement between the parties over what constituted a "spill". Etchason claimed that Mike Tallaksen ("Tallaksen"), Carry's Vice President of Safety and Personnel at the time[5], told him that only spills over ten gallons were required to be reported (Tr. 228). Tallaksen testified in a deposition, however, that while drivers could clean up "minor" spills, they were required to report spills over five gallons to their dispatcher (Com. Ex. 14, Tallaksen Depo., at 33-34).

Carry's written procedural materials offer little illumination. Its Orientation Materials[6] merely admonish the driver to "be

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[4](...continued)
12, 1990 notice without signature line) with Res. Ex. 4 (October 22, 1990 notice with signature line). I note that the most recent notice, dated March 15, 1991, was prepared on one of the older forms (Res. Ex. 9). However, I find that this discrepancy is most likely due to the fact that the form was prepared by Paul Zielenga, the General Manager of Carry's Lafayette, Indiana facility. The exhibit contains a facsimile transmission identification line which reflects a March 15, 1991 transmission date. Id.

[5] According to the Respondent's attorney, Tallaksen resigned his position at Carry in January, 1993. See Ad. Ex. 41. Tallaksen did not testify at the hearing. However, the transcript of his deposition was admitted into evidence (Tr. 288).

[6] There are two collections of written policies and procedures which have relevance to this case. The first is a series of memoranda instructing the drivers as to the performance of various operating procedures, such as loading and unloading tanks and trailers, etc. (Res. Ex. 17). For the sake of clarity, this document is referred to as the "Orientation Materials" in this decision. The second such item is a document entitled "Carry Companies Employee Manual", which contains more generalized personnel policies concerning, e.g. vacation, overtime, sick leave,
(continued...)

careful not to spill any product at the customer" and to "clean up [the] area in which you pumped off if any product residue exists within the proximity of the loading area." (Res. Ex. 17, "Tank Trailer Delivery Procedures" June 10, 1986, at p. 4). In Carry's Employee Manual, the failure to promptly report "spillage" is identified as an example of behavior which could lead to corrective action up to and including discharge (Res. Ex. 18). In addition, there is some question as to whether Etchason ever received all of the written materials. Etchason admitted that he had received a copy of the Employee Manual upon beginning at Carry (Tr. 184). However, he denied ever receiving a copy of the Orientation Materials (Tr. 184-85, 262), and no conclusive proof to the contrary was provided by Carry[7].

Herman Rosenberg ("Rosenberg"), a former driver at Carry, testified that he had never received a written warning for spills of five to ten gallons, although he added that he had been careful to clean such spills up before leaving the customer's place of business (Tr. 471-72). Rosenberg testified that he had been told by Tallaksen that it was not necessary to report spills of five or ten gallons (Tr. 476). Jeffrey Burns ("Burns"), a driver who was

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[6](...continued)
and the like (Res. Ex. 18). This document is referred to herein as the "Employee Manual".

[7] Carry submitted a checklist, listing the Orientation Materials, with a line for the driver's signature acknowledging their receipt (Res. Ex. 20). However, the document, which is dated May 22, 1990, contains no signature and bears only what appears to be the letters "Cl". Id. At the hearing, there was some dispute over whether the signature page was contained in the copy of Etchason's personnel file provided by Carry to the Complainant during discovery (Tr. 328-38, 384-86). There is insufficient evidence to support a finding that Etchason signed a copy of the document, for a number of reasons. First, while the letters "Cl" on the document appear similar to the first two letters of Etchason's signature on other documents, there is simply not enough writing to make an adequate comparison. Secondly, the date on the document is May 22, 1990, which was a week before Etchason started at Carry, and which does not match the May 29, 1990 date on all of the other documents executed by Etchason when he started work. See Com. Ex. 15. In addition, Ms. Hartrick, counsel for Carry, admitted at the hearing that Etchason's personnel file "at first could not be located" when the Complainant requested its production during discovery (Tr. 332). Finally, two other drivers, one of whom was still employed by Carry at the time of the hearing, testified that they never received a copy of the Orientation Materials (Tr. 470, 478). These factors raise legitimate concerns as to the document's authenticity, and preclude me from ascribing it a great deal of weight.

still working at Carry at the time of the hearing, testified that he reported all spills to the company. However, he further testified that he did not consider such a "spill" to exist unless there was an amount of product involved large enough that the driver was unable to clean it up on his own (Tr. 478-79).

I find it likely that some type of spill occurred at Grey & Company in August of 1990. However, it does not appear as though Etchason's superiors viewed the incident as a serious violation. Tallaksen, Carry's Vice President of Safety and Personnel and the Carry employee who ultimately fired Etchason, stated in a deposition that when making his later decision to place Etchason on probation in December, 1990, he "ignored" the alleged syrup spill, and that it "had nothing to do with the probation", due to the fact that there was no evidence as to the magnitude of the alleged spill (Com. Ex. 14, Tallaksen Depo., at 34-35). More serious, however, was the effect of Grey & Company's banning of Etchason from their facility, which Tamminga testified created a problem for Carry. See Tr. 393-95. Etchason admitted at the hearing that he was not permitted to return to Grey & Company after August, 1990 (Tr. 175-78).

The next incident occurred on September 12, 1990, at which time Carry alleges Etchason was delayed for nine hours, but failed to notify Carry of the delay. The Incident Report prepared by dispatcher Lance White ("White") is somewhat unclear, but appears to state that Etchason called from Dean Foods to report that he was being delayed, but failed to update his dispatcher every two hours thereafter on his situation (Res. Ex. 3; Com. Ex. 14, Tallaksen Depo., at 35-37). Etchason testified that the delay was caused by a problem with the customer's equipment, and that he called in to his dispatcher "numerous times" (Tr. 121). Later, he claimed to have called in every two hours until 6:00 p.m., at which time he left a message for the next dispatcher and fell asleep (Tr. 179-80). The Incident Report is nearly illegible, but appears to state that Etchason called in at 1:00 a.m. (Res. Ex. 3). Tallaksen confronted Etchason about it later, but Etchason informed him that he had, in fact, called in (Tr. 121-22). Carry's Orientation Materials advise drivers to report any delay to their dispatcher "as soon as possible", and in addition, to document any loading/unloading delay of greater than two hours (Res. Ex. 17). However, as noted earlier, there is no evidence that Etchason ever received the materials. In any event, this likewise was not considered a serious violation by Etchason's superiors. On the Incident Report, White remarked "Talk to[.] No action at this time" (Res. Ex. 3).

On October 22, 1990, Etchason erroneously pulled the wrong trailer to USI Quantum Chemical (Res. Ex. 4). By this time, Carry's "Incident Report" notices had been superseded by a form entitled "Incident Warning Notice", which included a line for the signature of the driver who was being warned. Id. See also Tr.

411, 415. However, Etchason's signature does not appear on the Incident Warning Notice documenting the October 22, 1990 incident. As a result of Etchason's error, the trailer he pulled was one which had not been properly washed out, and Carry was forced to have Etchason drive the empty trailer to Decatur, Illinois, approximately forty miles away, to be cleaned before he could return to the customer (Res. Ex. 4; Tr. 352-57). Etchason claimed that his dispatcher had orally given him the wrong trailer number, but admitted that he neglected to check the number written on the dispatch ticket (Tr. 122-25). Etchason also claimed that Dave Hoekstra ("Hoekstra"), Carry's Manager of Tank Fleet Operations, laughed about the incident and told him he would not get paid for his erroneous trip (Tr. 123). He later contradicted himself, claiming that a dispatcher, Wes Van Bruggen ("Van Bruggen"), was the only Carry official to speak with him about the incident, and denied having spoken with Hoekstra (Tr. 180-81). Hoekstra, for his part, claimed to have spoken only over the phone with Etchason concerning the incident (Tr. 355-56).

Hoekstra also testified that Carry's policy requires the drivers to check the tank for cleanliness prior to departure, and to obtain a tank wash certification (Tr. 352-53). The Orientation Materials, which Etchason may or may not have been given, place the responsibility of checking the tank for cleanliness and obtaining a wash certificate upon the driver (Res. Ex. 17, "Partners in Perfection Guidelines" Oct. 24, 1988). Even in the absence of such materials, however, I find Etchason's claims that he was unaware of the need to check trailers for cleanliness, and that Carry did "[n]ot necessarily" require tanks to be cleaned before being loaded with a new product, to be implausible. See Tr. 182-83.

An Incident Warning Notice was prepared on December 18, 1990 by dispatcher Van Bruggen detailing an incident where a customer called at 4:30 a.m. to report that Etchason had not arrived for a scheduled 4 a.m. pickup (Res. Ex. 5). The notice also states that Etchason arrived while the customer was on the phone. Id. Etchason testified that he was delayed by a flat tire, and that it was not necessary for a driver to report such a delay unless he or she was going to be more than thirty minutes late (Tr. 126-27). He stated that he received no Incident Warning Notice at that time (Tr. 127). He admitted that Tallaksen asked him why he was late and why he had failed to call in to report the flat tire, but stated that Tallaksen accepted his explanation that he thought he could make it to the customer within the thirty minute window. Id. See also Tr. 186. Carry's Orientation Materials provide that a driver must notify his or her dispatcher of any anticipated late pickup or delivery, but again, there is no conclusive evidence that Etchason received the materials (Res. Ex. 17, "Delivery Performance", Nov. 1, 1988).

The next incident occurred on December 28, 1990, when Etchason took a Carry tractor to his home rather than back to the Bridgeview

terminal after dropping off a load in Decatur, Illinois (Res. Ex. 6). Etchason admitted taking the tractor home, but contended that, pursuant to an unwritten Carry policy, he was allowed to take the tractor from Decatur to his home in Mattoon, rather than returning all the way to the Bridgeview terminal to pick up his car (Tr. 188-91). Etchason estimated that his home in Mattoon, Illinois, was approximately sixty miles from Decatur, while Bridgeview, Illinois was approximately 200 miles from Decatur (Tr. 191). He later testified that, prior to the incident, he had taken a tractor home frequently, and that other drivers took tractors home "all the time" (Tr. 229). Burns, another Carry driver, testified that drivers took their trucks home "all the time", and that they continued to do so at the time of the hearing (Tr. 478).

Tallaksen stated in his deposition testimony that Carry's company policy forbade taking a tractor home without first obtaining permission to do so (Com. Ex. 14, Tallaksen Depo., at 21-22). In fact, the Orientation Materials contain a memorandum, dated November 19, 1990, which states that drivers may not take trucks home without first obtaining permission to do so (Res. Ex. 17, "Notice to All Drivers" Nov. 19, 1990). However, as the memorandum was prepared in November, 1990, the parties stipulated at the hearing that it could not have been in the Orientation Materials allegedly distributed to Etchason when he began work at Carry in May, 1990 (Tr. 329). Carry offered no other evidence that Etchason ever received a copy of the memorandum, or that he was aware of the policy before the incident on December 28, 1990.

The testimony of Tamminga, Carry's Vice President of Operations, supports Etchason's version of the events. Tamminga testified that not only had he given Etchason permission to park his tractor at home on previous occasions, but that it was to Carry's advantage to have the drivers take their tractors home where doing so would position them closer to their next pickup (Tr. 399-400). He denied having given Etchason such permission on the date in question, and stated that following the opening of Carry's Decatur, Illinois facility in August, 1990, the drivers were told to park their units at the terminal "as much as possible"[8] (Tr. 400). Tamminga explained that by parking tractors at the terminals, drivers could take their cars home, which allowed the tractors to remain on company property, where the chance of theft was less likely (Tr. 400-01). However, Etchason's uncontradicted testimony was that he was based out of the Bridgeview terminal, and that on the date in question, his car was parked in Bridgeview, some 200 miles away from Decatur. See Tr. 190-91. Thus, given

[8] Tamminga testified that it was unlikely that Etchason did not know of the new policy, since it was posted and, in addition, the terminal manager in Decatur was instructed to convey the policy to each driver based in Decatur (Tr. 401). However, Etchason's testimony was that he was based in Bridgeview, not Decatur. See Tr. 190-91.

Tamminga's testimony, Etchason's decision to take the tractor to his home, which was only sixty miles from Decatur, seems reasonable.

In any event, while the tractor was parked at Etchason's residence, it became disabled, apparently due to the cold weather (Tr. 398). Due to problems with the air compressor, air pressure could not build up to allow the brakes to function properly, and the tractor in question ultimately had to be towed from Etchason's residence for repairs costing approximately $1,000 (Com. Ex. 14, Tallaksen Depo., at 22-23; Tr. 189-92, 239). On cross-examination, Etchason admitted that he had poured alcohol into the intake line of the compressor, but claimed that he had done so on the instructions of Keith Day, a Carry mechanic (Tr. 229-30). Tallaksen stated in his deposition testimony that Etchason caused the problem by pouring alcohol into the intake line, and that he could think of no reason for doing so (Com. Ex. 14, Tallaksen Depo., at 22-23). However, he admitted that, after investigating the matter, he found that Keith Day had instructed Etchason to pour a "small amount of alcohol" into the compressor to release an ice blockage. Id. at 25.

When Etchason returned to Bridgeview after this incident, he met for an hour with Tallaksen and Tamminga, and was informed that he was being placed on probationary status for ninety days (Tr. 192-94; Res. Ex. 6). Etchason testified that he was told not to take the tractor home in the future, and that "two or three" previous incidents were discussed (Tr. 192-93). An Incident Warning Notice was prepared, and was signed by Etchason, the only such warning submitted by Carry which contains Etchason's signature (Res. Ex. 6). Tamminga testified that, at the time of the meeting, he felt that Etchason should be terminated due to the air compressor incident and his previous incidents, but that, after hearing from both Etchason and Tallaksen, probation was agreed upon (Tr. 402-03). Tallaksen stated in his deposition testimony that Etchason was placed on probation due to all of the previous incidents, with the exception of the alleged August 10, 1990 syrup spill at Grey & Company, which was not considered because the extent of the spill had not been verified (Com. Ex. 14, Tallaksen Depo., at 34-36).

On January 17, 1991, Etchason called in to report that he was delayed at a customer, Campbell's Soup, due to the fact that the pump on his trailer was "candied up"[9], preventing him from pumping off his load of product (Tr. 128-29; Res. Ex. 7). Etchason was instructed to wait until the next morning, when two other Carry

[9] According to Etchason, the phrase "candied up" refers to a situation where liquid product solidifies in the pump of a tank trailer, rendering it impossible to pump off the product until the blockage is removed (Tr. 129).

drivers arrived to help him pump the product off (Tr. 129). He testified that, after the drivers arrived, it took six hours to pump the product off, which normally takes only forty-five minutes (Tr. 129-30).

Hoekstra, Carry's Manager of Tank Fleet Operations, testified that Jim Sargent, one of the drivers dispatched to help Etchason, called in and reported that there was no problem with the pump, and that the product was being pumped off (Tr. 359-60). See also Res. Ex. 7. Hoekstra also testified that the product involved, liquid corn syrup, was extremely thick and of heavy consistency and that, due to the cold winter temperatures, it may have taken longer than usual to pump off (Tr. 360). On cross-examination, he also admitted that the viscosity of such a product is related to temperature, and that the product would flow more freely as the temperature warmed up (Tr. 371). Hoekstra maintained, however, that while such a change in temperature could make pumping the product difficult, it would not be impossible (Tr. 377).

Carry's own Orientation Materials contain a memorandum which provides, in part:

> When hauling HFCS, Blends, and Sugar, before leaving loading station, spin the pump full of product as these products won't freeze and the pump will be free at stop. However, with any corn syrup . . . do not fill the pump. This will set up very quickly and cause problems.
>
> When preparing to pump at a customer in cold weather, make sure customer pipe is not set up with product, especially heavy syrup.

Res. Ex. 17, "All Tank Drivers" Nov. 9, 1988 (emphasis added)[10].

Etchason testified that, other than when he reported the problem to dispatcher Lance White, no one from Carry ever discussed the incident with him, or told him he had done anything wrong (Tr. 130, 195-97). Hoekstra claimed to have told Etchason that an Incident Warning Notice would be prepared and placed in his personnel file (Tr. 377). However, he had previously testified that his discussion with Etchason concerning the incident was limited to asking Etchason if he had any idea what the problem was in making the delivery (Tr. 360-61).

The next Incident Warning Notice, dated February 1, 1991, documents an incident in which Etchason apparently demanded that he be given thirty days of credit for a raise review (Com. Ex. 1).

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[10] For the reasons expressed previously, supra, there is no reliable evidence to prove that Etchason ever received a copy of this memorandum, which was contained in the Orientation Materials.

Tamminga, who prepared the notice, remarked on the form that he informed Etchason that such a request was "off base" in light of the fact that Etchason was still in probationary status. Id. Tamminga's final comment stated "This man is on probation now. He should be terminated." Id.

Etchason admitted talking to Tamminga about a raise, and claimed that, during the same conversation, he also told Tamminga that he was going to report Carry to the Department of Transportation (DOT) (Tr. 113, 131-32, 249-52). On one occasion, Etchason testified that Tamminga responded by telling him he ought to be fired (Tr. 113). Later, he testified that Tamminga responded by asking him "[Do] you want to be fired?" (Tr. 132). Still later, Etchason testified that Tamminga had told him that if he complained to the DOT, he "would be fired" (Tr. 249-50). When asked if Tamminga had really told him he would be fired for complaining to the DOT, Etchason replied "Right. That's on his statement that he gave me" (Tr. 250). Further discussion established that the "statement" Etchason was referring to was Tamminga's statement on the Incident Warning Notice prepared by Tamminga. See Tr. 250; Com. Ex. 1. However, Etchason had previously denied that Tamminga had shown him the Warning Notice at the time it was prepared (Tr. 132).

Etchason's testimony concerning the subject matter of the conversation was also unclear. Initially, when asked what he had discussed with Tamminga at the meeting, Etchason replied that they had discussed "the problems that had happened" (Tr. 114). Later, he stated that he asked Tamminga to document in writing "[a]ll these things that have happened to me", but he did not specify that he was referring to hours of service violations (Tr. 252). Instead, he seemed to be referring to Carry's refusal to conduct his salary review and to raise his rate of pay (Tr. 132). At another point, he seemed to be referring to the incidents documented in the Incident Notices and Incident Warning Reports (Tr. 252).

Tamminga testified that at the time, he considered Etchason's demand for a raise review "bizarre" (Tr. 405). However, he admitted on cross-examination that, regardless of whether a raise would be granted, an employee who had been with the company for Etchason's length of time at that point would have been eligible for a performance and raise review (Tr. 420-21). Tamminga stated that he reminded Etchason that he had wanted to fire Etchason in December, and that he was still a probationary employee. Id. He further stated that a company-wide wage freeze was in effect, and that he told Etchason that no request for a raise would be considered while he remained on probation. Id. When asked whether Etchason had mentioned the DOT, OSHA, or hours of service violations during the conversation, Tamminga replied "[n]ot that I recall" (Tr. 407).

I find it likely that, after Tamminga told him he would not be considered for a raise, Etchason made, at least, generalized threats to contact the DOT. However, I find insufficient evidence to establish that Etchason specifically brought up the hours of service issue with Tamminga at this time, or that Tamminga threatened to fire Etchason if he contacted the DOT.

Rosenberg, the former Carry driver, executed a sworn affidavit stating that, on February 1, 1991, he overheard a conversation between Tamminga and Hoekstra (Com. Ex. 2). In the conversation described in Rosenberg's affidavit, Tamminga allegedly told Hoekstra that Etchason had threatened to report Carry to the DOT and OSHA for safety and hours of service violations, and that Etchason "was going to be fired for [reporting Carry], one way or the other." Id. However, I did not find Rosenberg to have been a particularly credible witness. His testimony at the hearing differed somewhat from his affidavit. There, he testified that Tamminga had stated only that he was going to "handle the situation", which he understood to mean that Etchason would be fired (Tr. 25). When further questioned about the discrepancy, Rosenberg admitted that he had not actually heard Tamminga say that he was going to fire Etchason (Tr. 51-52). This discrepancy would not seem significant were it not for the relative detail with which Rosenberg described the alleged statement in his affidavit. In addition, as a former employee of Carry terminated under disputed circumstances, Rosenberg may have been motivated to portray Carry in as unflattering a light as possible.

On March 13, 1991, Etchason, while at Carry's Lafayette, Indiana facility, mistakenly failed to lower the trailer on a concrete landing pad, and instead lowered it on a gravel surface, which resulted in the trailer's landing gear[11] sinking into the ground (Tr. 130-31; Res. Ex. 8). Etchason claimed that he dropped the trailer where he had been instructed to (Tr. 131), and that no concrete pad was available on which to drop the trailer (Tr. 198). As a result of the sinking, Carry was forced to send out another tanker to pump out the product from Etchason's trailer, so that Etchason's trailer could be raised back up (Tr. 198, 311). Tamminga testified that the landing gear is cranked down by hand, and that Etchason should have been able to tell whether or not he was on the concrete pad (Tr. 409-10). He further stated that common sense would dictate dropping the trailer on a concrete pad, although he admitted that "it would have made a difference" if Etchason had been instructed to drop the trailer there (Tr. 431). Carry's Orientation Materials contain a memorandum instructing drivers to "[m]ake sure the area that the landing gear shoes will

[11] A trailer's landing gear, also known as "shoes" or "sand shoes" is cranked down by hand so that the tractor may be removed, allowing the trailer to stand by itself. See Tr. 311 (testimony of Hoving).

rest on is solid, (concrete pad)" (Res. Ex. 17, "All Drivers" Nov. 15, 1988), but again, there is no proof that Etchason ever received the memorandum.

Etchason claimed that no one from Carry discussed the incident with him at the time, and that he received no written warning concerning the incident (Tr. 131, 199). Tamminga's testimony supports Etchason's contention. Tamminga, who filled out the Incident Warning Notice, testified that while the trailer was sinking and Carry management was determining how to correct the problem, he communicated only with another driver, Dennis Pickett (Tr. 410-11). He further testified that he never had a chance to discuss the incident with Etchason, due to the fact that Etchason was terminated by Tallaksen on March 15, 1991, following an unrelated incident (Tr. 411, 430).

The final incident prior to Etchason's termination occurred on March 14, 1991, when Etchason was delivering a shipment of sugar to Pepsi-Cola in Cincinnati, Ohio (Res. Ex. 9). According to the Incident Report filled out by Paul Zielenga ("Zielenga"), the General Manager of Carry's Lafayette facility, Nancy Rachford ("Rachford"), the lab technician[12] at Pepsi, called to request that Etchason not be sent back to Pepsi. Id. Rachford complained of repeated delays caused by Etchason's failure to follow instructions, and stated that Etchason had "the appearance and actions of someone on drugs." Id.

Zielenga did not testify at the hearing. However, Rachford, who has since left Pepsi, did appear and testify. Rachford testified that when she arrived at work, her lab technician complained that she had instructed Etchason to back up his truck so that bacteriological samples could be taken, but that Etchason had failed to do so (Tr. 437-38). Rachford stated that she then instructed Etchason to back up to an overhead door, and that when she returned, Etchason had backed up to the wrong door (Tr. 439). She then instructed Etchason to pull out the hoses to unload the tank, which he also failed to do without further delay (Tr. 441). Finally, when the unloading process was underway, she noticed that Etchason had left his truck[13], and was wandering around in Pepsi's syrup mix room (Tr. 443). Rachford confirmed that she had called

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[12] Rachford's position at Pepsi-Cola was actually Quality Control Manager. See Tr. 437.

[13] Carry's Orientation Materials contain a memorandum instructing its drivers not to leave their trucks unattended while unloading, except to check the level of the customer's storage tank (Res. Ex. 17, "Tank Trailer Delivery Procedures" June 10, 1986, at 3). However, once again, there was insufficient proof offered at the hearing to establish that Etchason ever received a copy of the Orientation Materials.

Zielenga and asked that Etchason not be sent back to Pepsi, and that she had in fact stated that Etchason appeared as though he were on drugs (Tr. 444, 451-52).

Rachford was unsure how long the unloading process had taken, although she estimated two hours, at the maximum (Tr. 458). She stated that, to her knowledge at the time, Etchason had never delivered to Pepsi before (Tr. 456-57). Yet, despite Etchason's unfamiliarity, she was sufficiently "perturbed" at the amount of her time wasted in the unloading, and Etchason's failure to comprehend her instructions that she called Carry to request that Etchason not be sent back. Id. She admitted that Etchason was not rude, hostile or discourteous to her (Tr. 459). She denied requesting that Carry terminate Etchason's employment (Tr. 460).

Etchason denied that the lab technician at Pepsi told him he had parked in the wrong spot (Tr. 201). He claimed to have stayed within fifteen feet of his truck throughout the entire unloading process, although he admitted that part of the time was spent inside the Pepsi building (Tr. 202-03). Etchason testified that when he left, Rachford stated that she was going "to take care" of him (Tr. 203). Later, Etchason testified that the entire truck was parked in the building while it was unloaded (Tr. 233). He admitted backing up to the wrong door, but stated that he had used the door on the one previous occasion that he delivered to Pepsi (Tr. 232-33). Etchason claimed that Rachford told him that she was having him back up to the other door because it was cold out that morning (Tr. 233).

2. Etchason's March 15, 1991 Termination:

When he returned to Carry on March 15, 1991, Etchason met with Tallaksen, who informed him that his employment was being terminated (Tr. 204). Etchason testified that, during the meeting, Tallaksen read the statement prepared by Zielenga, after which Etchason denied that he had done anything wrong, and accused Rachford of lying. Id. He admitted pointing at Tallaksen during the conversation. Id. Etchason also stated that neither hours of service violations nor his alleged complaints to the DOT were discussed at any point during his March 15th meeting with Tallaksen (Tr. 214).

Tallaksen testified at his deposition that, following the incident, he called Etchason into his office in order to hear his side of the story (Com. Ex. 14, Tallaksen Depo., at 53-54). He further stated that, after hearing the complaint, Etchason became belligerent with him, rising from his chair, pointing at him, and "ranting and raving", at which time he terminated Etchason's employment. Id. at 54-59. At first Tallaksen stated that he fired Etchason because of his conduct during the meeting, but later contended that he considered Etchason's entire record, and that his finger-pointing was merely "the last straw." Id. at 57. Carry's

Employee Manual, which Etchason admits receiving a copy of, warns that improper conduct which could lead to discipline up to and including discharge includes "engaging in . . . offensive, hostile, or intimidating conduct" (Res. Ex. 18, "Rules of Conduct").

Hoving, Carry's President, also met with Etchason on March 15, 1991, just after Etchason had been discharged (Tr. 315). He testified that Etchason did not mention DOT complaints or drivers' hours at any point during the conversation (Tr. 316). Tamminga testified that he played no part in the decision to fire Etchason (Tr. 429). He stated that he had no contact with Tallaksen prior to the termination, other than to provide Tallaksen with a copy of Zielenga's Incident Report concerning the complaint from Pepsi (Tr. 429-30). Hoekstra also testified that he played no part in the decision to fire Etchason (Tr. 381).

3. Hours of Service Violations:

A great deal of testimony was elicited concerning hours of service violations at Carry. Etchason testified that the first time he received a dispatch which he lacked the available hours of service to legally perform, he informed his dispatcher, Lance White, that he was out of hours, but that White insisted he accept the dispatch anyway (Tr. 105-07). Etchason complied, and completed the dispatch, falsifying his log books so that it would appear he did not violate hours of service regulations (Tr. 106, 108). In fact, Etchason testified that Tallaksen even showed him how to alter his log book to cover up any violations, although Etchason already knew how to do so (Tr. 108-09). When he complained to Tallaksen about repeatedly being dispatched over hours, Etchason testified that Tallaksen replied "That is the way it works here" (Tr. 112). Besides White and Tallaksen, Etchason also claimed to have voiced his complaints concerning hours of service violations to Hoving, Hoekstra, Tamminga, and many of the Carry drivers with whom he came into contact (Tr. 112-13).

Etchason testified that in January of 1991, he contacted the DOT to file a complaint alleging that it was standard procedure at Carry to require drivers to operate in violation of hours of service regulations, which was resulting in accidents due to driver fatigue (Tr. 114-15). Later, Etchason stated that he could not remember the exact date he called the DOT, but that the person he spoke with was Algie Horton ("Horton"), a DOT employee (Tr. 144). He produced a letter signed by Horton confirming such a conversation (Com. Ex. 7). However, the letter was not printed on DOT letterhead, and Horton advised that he could not represent the DOT's official position. Id. Etchason claimed to have told Tamminga about his contacting the DOT during the February 1, 1991 confrontation he had with Tamminga concerning his request for a raise review, which was previously discussed, supra.

Etchason testified that while he complained on a weekly basis about driving out of hours, Carry dispatchers continued to assign him loads even when he told them he was out of hours, and he continued to accept the dispatches (Tr. 247-48). He stated that he actually refused to accept a dispatch on only one occasion due to his being out of hours (Tr. 248). On that occasion, the dispatcher, whose name Etchason could not recall, did not threaten him with loss of employment if he refused to accept the dispatch (Tr. 249).

There was ample support in the record for Etchason's allegation that it was standard procedure for Carry, as a company, to encourage, if not to require, its drivers to drive in violation of DOT hours of service regulations. Rosenberg, the former Carry driver, testified that it was a weekly occurrence for him to drive in excess of the legally permitted hours of service (Tr. 20-21). Burns, who remained a driver for Carry at the time of the hearing, testified that he had observed at least fourteen violations since 1990, and that it was standard practice for Carry drivers to drive in violation of hours of service regulations (Tr. 58-59). He further testified that Bob Hoffman, a former Safety Director at Carry, had instructed him to "make the log books look legal" when driving while out of hours (Tr. 60). Burns stated that such violations still occurred at Carry to some extent up to the time of the hearing (Tr. 63). He also testified that, on previous occasions, both Hoekstra and Tamminga had instructed him to take loads despite the fact that he was out of hours (Tr. 67).

Burns also testified that he overheard conversations while in the dispatch area in which Hoekstra instructed Etchason to take loads, despite the fact that he was out of hours (Tr. 76). He stated that he heard Hoekstra refer to Etchason as a "baby" for complaining about being required to drive excessive hours, and that Hoekstra and Tamminga were at times upset with Etchason for telling his dispatchers that he was out of hours[14] (Tr. 77, 80-81). In addition, Burns testified that Etchason complained to him about his hours of service in July, 1990, threatening to report Carry to the DOT, and that afterward, he told Hoving and Hoekstra about Etchason's statements (Tr. 79-81). Burns stated that the problem with drivers violating DOT hours regulations was due to a combination of Carry's requiring them to do so and the drivers' willingness to work excess hours to obtain additional compensation (Tr. 98). He stated that, while working in the dispatch office auditing log books in October, 1992, which was after Etchason's termination, he noticed a decrease in hours of service violations, due to increased compliance efforts by Carry (Tr. 72-74, 96-97). When a

[14] Burns also testified that, at one point, he overheard Tamminga telling Hoekstra that "we might as well get rid of [Etchason]" (Tr. 81). However, he could not relate the context of the discussion in which the statement was made (Tr. 81-82).

violation was found, he was to report the offending driver to Tallaksen, who would then reprimand the driver (Tr. 74-75).

Tallaksen, the Vice President of Safety and Personnel during Etchason's tenure at Carry, testified in deposition that Carry had been assessed fines of $27,000, $11,000 and $16,000 by the DOT for violations including paperwork violations, log falsification and hours of service violations (Com. Ex. 14, Tallaksen Depo., at 13-16). He testified that he was unaware of Etchason ever complaining about excessive hours being forced upon the drivers until after he had been terminated. Id. at 11, 31.

Tallaksen also testified in the deposition about a memorandum prepared by Carry's owner, Tom Wierenga, allegedly instructing Carry's dispatchers never to turn down a load from a Carry customer (the "Wierenga Memorandum")[15]. He stated that while the Wierenga Memorandum stated only that dispatchers were not to refuse a load from a customer, what it meant was that, instead of turning down a load, the dispatchers were to inform the customer that, although the load could not be delivered precisely when requested, it could be delivered at a later time. Id. at 87. Hoving testified that the Wierenga Memorandum merely requires a dispatcher to go up the chain of command, to ensure that all possibilities for accepting an order are considered (Tr. 304-07). Tamminga and Hoekstra gave similar explanations of the policy (Tr. 365, 412-14).

Hoving testified extensively on the hours of service issue. He admitted that Carry has had continuing problems with hours of service violations since at least 1983-84 (Tr. 316-18). Carry took steps to improve its performance, but Hoving testified that in each DOT audit, hours of service violations and log falsifications had been identified as continuing problems (Tr. 317-20). On cross-examination, Hoving admitted that Carry knew its drivers were driving out of hours and falsifying logs at the same time as the Wierenga Memorandum was issued instructing dispatchers not to turn down loads (Tr. 325-27). He agreed that when a dispatcher lacked a driver with hours available to make a run, one of the options considered before turning down a dispatch was allowing a driver to run in violation of the hours of service regulations (Tr. 327). In fact, Hoving frankly admitted that, from Carry's standpoint, it was better to break the law (with respect to hours of service) than to turn down a load from a customer (Tr. 328).

[15] Although various witnesses testified about the Wierenga Memorandum and its meaning, the memorandum itself was never offered into evidence.

Hoving testified that Etchason never complained to him about driving excessive hours[16], or about Carry's policy of encouraging drivers to do so (Tr. 312). He also denied hearing about Etchason's complaints and threats to contact the DOT from anyone else at Carry, including Burns (Tr. 313, 344). He contended that if a driver were to refuse a load due to a lack of available hours, no adverse action would result (Tr. 323).

Hoekstra testified that Etchason never told him he was going to contact the DOT, or complained to him about hours of service (Tr. 361). In fact, he testified that Etchason frequently complained that he wanted more dispatches (Tr. 362). Hoekstra stated that a driver turning down a dispatch for lack of hours would suffer no adverse consequences (Tr. 363-64). In direct contrast to Hoving's testimony, Hoekstra stated that when faced with a customer request to pick up a load, sending a driver who was out of hours was not an option (Tr. 365). He also stated that he could not recall any situation where Etchason informed him that he was out of hours, but was sent out anyway (Tr. 370).

Tamminga testified that, although some drivers did run while out of hours, it was not true that Carry's owner, Wierenga, cared more about accepting orders, with their accompanying revenue, than about complying with the law (Tr. 414). He denied ever having dispatched Etchason to cover a load while knowing that he was out of hours (Tr. 432). He also denied having ever dispatched <u>any</u> Carry driver to cover a load knowing that the driver was out of hours (Tr. 433-34). Like Hoekstra, Tamminga testified that, not only did Etchason not complain about working over the permitted hours, but that he in fact frequently requested that he be assigned more hours (Tr. 431-32).

4. <u>Etchason's Post-termination Contacts with Tallaksen</u>:

Much of Etchason's belief that he was terminated by Carry for improper reasons seems to stem from conversations he had with Tallaksen in meetings following his termination by Carry. The discussions at these meetings were the subject of conflicting evidence.

Etchason testified that when he spoke with Tallaksen on the day Tallaksen terminated him, Tallaksen told him he was being fired because of the incident at Pepsi-Cola, and that no discussion of hours of service occurred (Tr. 115-16). Following his termination, however, Etchason claimed to have met with Tallaksen "four or five" times, including at least one such meeting at a bar called "Nickaby's" (Tr. 136). He testified that, while at these meetings,

[16] Hoving did admit that Rosenberg complained to him on a number of occasions about the hours the drivers were being required to drive (Tr. 313-14).

he discussed Carry's hours of service problems with Tallaksen, and that Tallaksen told him that he had to carry out the policies of Carry in order to avoid losing his job. Id. Etchason claims that during the meeting at Nickaby's, Tallaksen told him that he had been fired for being on Carry's "hit list", an informal, unwritten list of drivers who were to be terminated (Tr. 138-42). Etchason first stated that the "hit list" consisted of drivers who supported unionization (Tr. 139). Later, he claimed it also included drivers who complained about being out of hours of service (Tr. 140). Still later, he again associated the list exclusively with union activity (Tr. 142).

Rosenberg testified that during the meetings, Tallaksen never indicated that Etchason had been fired for poor job performance (Tr. 37). In fact, the only statement by Tallaksen concerning Etchason's job performance which Rosenberg recalled was Tallaksen's statement that the mechanic who told Etchason to pour alcohol into the air intake line should have admitted his responsibility for the compressor problem. Id. Rosenberg denied that Tallaksen was intoxicated at any of the meetings, although he admitted that some of them did take place at bars (Tr. 52). He stated that Tallaksen had in fact discussed an unwritten "hit list" maintained by Carry, and had stated that, after a driver's name was placed on the list, the company would begin to document seemingly legitimate reasons to justify the driver's termination (Tr. 473-74).

Tallaksen admitted meeting with Etchason "several times" after Etchason had been terminated, but contended that Etchason never mentioned his belief that he was fired for reporting Carry to the DOT until after a separate complaint of Etchason's had been dismissed by the National Labor Relations Board (Com. Ex. 14, Tallaksen Depo., at 66-67). Later, he claimed that he did not recall Etchason mentioning hours of service regulations at the meeting, but noted that they had been drinking "quite a bit", to the extent that his responses to Etchason's questions at that time were "possibly" unreliable. Id. at 75-76. Etchason testified that, following Tallaksen's deposition, Tallaksen informed him that he had lied in the deposition in order to save his job (Tr. 137). Rosenberg also claimed to have been told by Tallaksen that parts of his deposition testimony were not true (Tr. 33-34). Etchason claimed, at the hearing, to have a letter written by Tallaksen setting forth the true reasons why Etchason was fired, which purportedly cited his hours of service complaints among the reasons (Tr. 253-54). However, no such letter was ever produced.

I do not find Etchason's and Rosenberg's allegations of a "hit list" to be credible, at least to the extent that it related to anything other than union activists. When testifying about the alleged list at the hearing, Etchason associated the list with the union. His later attempt to add STAA activists to the "list" appeared to me to be an attempt to reshape his discussions with Tallaksen to fit an STAA cause of action. This impression is

further supported by Tallaksen's statement that Etchason never mentioned his belief that he had been fired for reporting Carry to the DOT until after his NLRB complaint was dismissed.

B. Discussion:

Section 2305 provides, in part:

> (a) No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.
>
> (b) No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 2305 (Supp. 1994).

Claims under the STAA are adjudicated pursuant to the standard articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under that framework, the Complainant must initially establish a prima facie case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. Once a prima facie case is established, the burden of production then shifts to the Respondent to articulate, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. If the Respondent is successful, the prima facie case is rebutted, and the Complainant must then prove, by a preponderance of the evidence,

that the legitimate reasons proffered by the Respondent were merely a pretext for discrimination. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987); See also Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

The Supreme Court recently addressed the burden-shifting under such statutes in extensive detail in St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). In that case, Justice Scalia, writing for the Court, held that in meeting its burden of production, an employer need only articulate a legitimate reason for the adverse action, and that no credibility assessment is appropriate at that time. Id. at 2748. In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the action. Instead, he or she must prove both that the asserted reason is false (i.e. not the true reason for the action), and that discrimination was the real reason for the adverse action. Id. at 2752-56. Such a requirement is necessary in that it is the employee who bears the ultimate burden of persuading the trier of fact that he or she was the victim of intentional discrimination. Texas Dep't. of Community Affairs v. Burdine, supra, at 253; See also Hicks, supra, 113 S.Ct. at 2751.

To establish a prima facie case of retaliatory discharge, the Complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of his employer. Moon, supra, 836 F.2d at 229. The Secretary has taken the position that, in establishing the "causal link" between the protected activity and the adverse action, it is sufficient for the employee to show that the employer was aware of the protected activity at the time it took the adverse action. See Osborn v. Cavalier Homes, 89-STA-10 (Sec'y July 17, 1991); Zessin v. ASAP Express, Inc., 92-STA-33 (Sec'y Jan. 19, 1993).

Etchason's Prima Facie Case

Protected Activity:

Under subsection (a) of Section 2305, protected activity may be the result of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order. 49 U.S.C.A. § 2305(a) (Supp. 1994); Reed v. National Minerals Corp., 91-STA-34 (Sec'y July 24, 1992); Davis v. H.R. Hill, Inc., 86-STA-18 (Sec'y Mar. 18, 1987).

Etchason's complaint to DOT employee Algie Horton in January, 1991 constitutes protected activity under subsection (a). While an official DOT memorandum of such a contact would certainly have been

preferable, I find that Etchason's testimony (Tr. 114-15, 144, 152-59), combined with the letter he received from Horton (Com. Ex. 7), is sufficient to establish such a contact. In addition, Etchason's uncontradicted testimony establishes that he also contacted Patrick Gleason of the Illinois DOT in January, 1991, a contract which also constitutes protected activity (Tr. 150).

Etchason also testified that he frequently complained about hours of service violations to various Carry supervisory personnel, including Tallaksen, Hoving, Hoekstra and Tamminga (Tr. 112-13, 143). Tallaksen denied, in his deposition, that Etchason had ever complained to him regarding excessive hours of service (Com. Ex. 14, Tallaksen Depo., at 11, 31). Etchason claimed that he had brought the question of hours of service up with Tallaksen, who responded "That is the way it works [at Carry]" (Tr. 112). Etchason and Rosenberg each testified that, when they had met with Tallaksen at Nickaby's following Etchason's termination, Tallaksen had told them that he had lied during his deposition in order to save his job (Tr. 33-34, 137). Rosenberg was extremely vague when pressed to identify specific topics Tallaksen had admitted lying about, mentioning only topics concerning his own firing (Tr. 34-35). Based upon the frank nature of Tallaksen's deposition testimony, much of which was unflattering to Carry, I find the allegations of Etchason and Rosenberg in this regard to be unworthy of belief.

Hoekstra and Tamminga also denied ever having heard Etchason complain about his hours of service, and in fact testified that Etchason frequently asked for more hours (Tr. 361, 431-32). I find neither Hoekstra nor Tamminga to have been a credible witness. Hoekstra testified that, when faced with a lack of available drivers, sending a driver who was out of hours to cover a dispatch was not an option considered by Carry, despite the fact that Hoving, Carry's President, admitted exactly the opposite during his testimony. See Tr. 327. Hoekstra also denied that Etchason had ever complained to him about hours of service, or that he had ever dispatched Etchason knowing he was short of available hours. However, Etchason's testimony on this issue was buttressed by the testimony of Burns. Burns testified that he had heard Hoekstra dispatch Etchason despite his lack of available hours, and that Hoekstra had called Etchason a "baby" for complaining about such dispatches (Tr. 76-81). I find Burns to be credible in this regard, especially in light of the fact that, unlike Rosenberg, he was still employed by Carry at the time of the hearing, and thus had every incentive to be as favorable to Carry as possible during his testimony.

Tamminga went even further than Hoekstra, denying at one point that he had ever dispatched any Carry driver to cover a load knowing that the driver was out of available hours. However, in addition to Etchason, Burns testified that he had instructed to take loads by both Hoekstra and Tamminga despite their knowledge

that he had no available hours (Tr. 67). Moreover, Tallaksen and Hoving both testified that hours of service violations were a continuing problem at Carry, as recounted previously, supra. Based on the testimony at the hearing, it seems Hoekstra and Tamminga were the only people at Carry who were not aware of the extensive hours of service violations occurring at Carry during the period in question, a scenario which I find extremely unlikely in light of their respective positions within the company. Therefore, I find that the evidence establishes that Etchason complained at various times to Tamminga and Hoekstra about being dispatched beyond his available hours of service, and that such complaints constituted protected activity.

Hoving denied that Etchason had ever complained directly to him about being dispatched when out of available hours of service (Tr. 312). In general, I found Hoving to be a credible witness, an impression which was reinforced in light of his frank testimony concerning Carry's extensive and persistent hours of service compliance problems. To this end, I credit his testimony that Etchason never complained directly to him concerning hours of service violations prior to his termination[17].

Under subsection (b) of Section 2305, an employee also engages in protected activity when he or she refuses to operate a commercial motor vehicle where such operation would constitute a violation of a commercial motor vehicle rule or regulation, including the DOT hours of service regulations. Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y Aug. 31, 1992). Also protected under subsection (b) is a work refusal where the employee reasonably believes that, due to the unsafe condition of the equipment, operation of the vehicle would likely result in serious injury to himself or the public. 49 U.S.C.A. § 2305(b) (Supp. 1994). The "federal violation" clause is not triggered, however, unless there is proof of a work refusal. Id.

In this case, Etchason testified that there was only one such occasion when he refused to accept a dispatch because he was out of hours (Tr. 248). However, he could not remember the time, approximate date, or dispatcher involved in the incident. Id. I find Etchason's testimony to be so vague on this point so as not to support a finding that he engaged in protected activity under subsection (b) of Section 2305.

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[17] Etchason's testimony on this point was contradictory. He first stated that he talked to Hoving about hours of service violations, but that Hoving "never had a response" (Tr. 113), which at least suggests that he spoke with Hoving about it on more than one occasion. However, in the next breath, Etchason testified that he spoke with Hoving concerning hours of service only once, a week or two after he was hired. Id. Therefore, I credit Hoving's testimony on this point.

Adverse Employment Action:

The parties stipulated that Carry terminated Etchason's employment on March 15, 1991. See "Stipulations", supra. Therefore, I find that this element of the Complainant's prima facie case has been established.

Causal Relationship:

The final element of the Complainant's prima facie case is the establishment of a causal link between the protected activity and the adverse employment action. As noted previously, an inference of causation may be raised by proving that Carry had knowledge of Etchason's protected activity at the time it engaged in the adverse employment action.

By the very nature of Etchason's direct complaints concerning hours of service to Hoekstra and Tamminga, I find that Carry did, in fact, have knowledge of that portion of Etchason's protected activity. As discussed above, however, I find insufficient evidence to support a finding that Etchason made such complaints to Tallaksen. I find it likely, however, that in his position as Vice President of Safety and Personnel, Tallaksen was at least aware of the fact that Etchason had made such complaints.

Hoving, Carry's President, also testified that Etchason never complained to him regarding excessive hours prior to his termination, and I have previously credited his testimony on that point. I do not credit his statement, however, that he had not heard of Etchason's complaints from anyone else at Carry, including Burns. See Tr. 313, 344. Burns testified that in July, 1990, after Etchason had complained to him about his hours of service, he informed Hoving about Etchason's complaints, and suggested having the dispatchers "ease up" on Etchason (Tr. 79). Burn's version of the events is supported by the testimony of Tallaksen. Tallaksen admitted that he had "probably" told Etchason that Burns was a "snitch", and explained that "[e]very time somebody does something wrong, you see [Burns] running in Howard's office" (Com. Ex. 14, Tallaksen Depo., at 77).

As to Etchason's January, 1991 contacts with the DOT, Etchason estimated that 300 of Carry's 400 drivers knew of his complaint to the DOT (Tr. 163, 238). Burns testified that he heard of Etchason's DOT complaint "through the grapevine", and that it was "common knowledge" among the drivers that Etchason had made such a complaint (Tr. 90, 93). The only Carry supervisor Etchason claimed to have informed of his intent to contact the DOT was Tamminga (Tr.

163-64)[18]. As discussed extensively, supra, I find sufficient evidence to support a finding that Etchason threatened to contact the DOT in his February, 1991 confrontation with Tamminga, although perhaps not specifically in relation to hours of service violations. Therefore, I find the evidence sufficient to establish that Tamminga had knowledge of Etchason's January, 1991 contact with the DOT.

The knowledge, on the part of various Carry supervisory personnel, of Etchason's protected activity is sufficient to establish the necessary "causal link" between the protected activity and the subsequent adverse employment action. As such, I find that Etchason has succeeded in establishing a prima facie case of retaliatory discharge.

Rebuttal of the Prima Facie Case

Since Etchason has established a prima facie case of retaliatory discharge, the burden of production now shifts to Carry to establish a legitimate, nondiscriminatory reason for terminating Etchason's employment. To meet its burden, Carry need only articulate such a legitimate reason, a task which involves no credibility assessment at this stage of the proceedings. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748 (1993).

Most of the evidence concerning Carry's alleged reasons for terminating Etchason's employment was contained in Tallaksen's deposition testimony. As discussed previously, Tallaksen testified that after Rachford had called from Pepsi-Cola to complain about Etchason's conduct and to request that he not be sent back to Pepsi, he instructed Tamminga to call Etchason in so that he could hear Etchason's side of the story (Com. Ex. 14, Tallaksen Depo., at 52-53). Tallaksen contended that after he related Rachford's complaint to Etchason, Etchason jumped out of his chair and pointed at Tallaksen, stating that Rachford was lying, and that he was being set up. Id. at 54, 58-59. Tallaksen claimed that, after trying unsuccessfully to calm Etchason down, he finally said "That's it, Clyde. You are through. Get your stuff out of your truck." Id. at 59. Tallaksen first indicated that he fired Etchason because of the complaint from Pepsi and Etchason's conduct during the meeting. Id. at 54-55. Later, he characterized Etchason's behavior at the meeting as merely being "the last straw" in the decision to fire him. Id. at 57.

[18] Etchason also testified that he informed Hoving of his intention to file a complaint with the DOT concerning hours of service violations on March 15, 1991, the day he was terminated. However, Etchason's own testimony established that his discussion with Hoving took place while Tallaksen was already in the process of preparing Etchason's termination papers. See Tr. 163-66, 249-50.

In an affidavit executed in support of Carry's Motion for Summary Decision in this case, dated September 25, 1992, Tallaksen stated: "On or about March 15, 1991, as a result of Etchason's persistent performance problems and customer complaints, I informed him that he was discharged." Com. Ex. 14, Tallaksen Deposition Exhibit 1; Ad. Ex. 22, Motion for Summary Decision, Exhibit F. Etchason's personnel file from Carry contains a termination form dated March 17, 1991 on which Tallaksen listed the reason for Etchason's termination as: "Customer Complaint. Failure to complete Probation period." (Com. Ex. 15).

Etchason's history of mishaps and customer complaints, his being banned from further deliveries at Pepsi, and his conduct during the meeting with Tallaksen, if credited, certainly would constitute legitimate and nondiscriminatory grounds for Etchason's termination. Therefore, I find that Carry has successfully carried its burden of production. As a result, it is now incumbent upon Etchason to prove that Carry's asserted reasons are pretextual, i.e. that they were not the true reasons for his termination, and that retaliation for STAA protected activity was in fact the true reason.

Pretext

Etchason has gone to great lengths to demonstrate that violations of the DOT's hours of service regulations were a common occurrence during his tenure at Carry. Those violations are noted. Carry's own President admitted as much, and in fact stated that, from Carry's point of view, it was better to break the law than to turn down a load from a customer (Tr. 328). While such an attitude is appalling, it is, in many cases, a correct statement of the economic realities of the trucking industry, and does not necessarily lead to the conclusion that Carry discharged Etchason for engaging in protected activity. In any event, it is still incumbent upon Etchason to establish that the reasons asserted by Carry for his termination are pretextual, and I ultimately conclude that Etchason has failed to carry his burden of persuasion.

Etchason's termination occurred on March 15, 1991, slightly over one month after his dispute over a salary review with Tamminga, during which he allegedly threatened to contact the DOT. The proximity in time of protected activity vis-a-vis adverse employment action can support an inference of causation. Ertel v. Giroux Bros. Transp., Inc., 88-STA-24 (Sec'y Feb. 16, 1989). However, several factors lead me to conclude that such an inference is not warranted here.

Initially, I note that Etchason never explicitly stated what he threatened to report to the DOT, and that his testimony led me to believe that he had threatened to approach the DOT over Carry's refusal to conduct his anticipated salary review. Tamminga's statement on the Warning Notice, "This man is on probation now. He

should be terminated." (Com. Ex. 1), does not persuade me to the contrary. Although I did not find Tamminga to be a credible witness, I find it implausible to think that, if Etchason had really informed Tamminga that he was going to report Carry to the DOT for hours violations, Tamminga would have been foolish enough to immediately recommend, Etchason's termination in writing.

I find that Tamminga's comment was more likely another example of Tamminga's personal animosity toward Etchason, which was exacerbated by Etchason's demand for a raise while he was still on probation. Tallaksen testified in his deposition that Etchason and Tamminga "had a personality conflict", and that Tamminga had made up his mind "months prior" to the Pepsi incident that Etchason should be fired (Com. Ex. 14, Tallaksen Depo., at 59-60). No matter what Tamminga's motive, he did not find Tallaksen to be an ally in his attempt to have Etchason fired. In fact, Tallaksen intervened on Etchason's behalf on more than one occasion. When asked whether Tamminga was "out to get" Etchason, Tallaksen replied that Tamminga "can't get [Etchason] without me." Id. at 60. Tallaksen further testified that he had refused Tamminga's requests that he fire Etchason on three occasions: in December, 1990, when the compressor on Etchason's tractor was damaged while parked at Etchason's home (Tallaksen had instead placed Etchason on probation); after Etchason's demand for a salary review; and a third occasion which Tallaksen could not recall. Id. at 60-61.

The overwhelming consideration which leads me to conclude that Etchason's termination was unrelated to his protected activity is his abysmal performance history, which culminated in his being banned by Pepsi from making future deliveries, the second time a Carry customer had taken such action. In the less than ten months he was employed at Carry, Etchason averaged one disciplinary problem per month, was placed on probationary status, and had been banned by two separate customers.

Etchason contended at various times that the Incident Warning Notices had been produced after his termination in order to document seemingly legitimate reasons for his termination. Such a contention is belied, however, by Etchason's admissions that virtually all of the events documented in the Incident Warning Notices did in fact occur. Etchason denied that he had spilled syrup at Grey & Company on August 10, 1990 (Res. Ex. 2), or that he had failed to call in every two hours when delayed on September 12, 1990 (Res. Ex. 3). Giving Etchason the benefit of the doubt, and assuming that neither incident took place, a substantial number of events remain:

> Etchason admitted scraping his landing gear at Grey & Company on August 2, 1990 (Res. Ex. 1), which resulted in Carry's having to pay for repairs to the customer's driveway;

Although he denied the syrup spill at Grey & Company (Res. Ex. 2), he admitted that he was banned from returning to Grey and Company at the customer's request;

Etchason admitted having pulled the wrong trailer to USI Quantum Chemical on October 22, 1990 (Res. Ex 4), as a result of having failed to either check the trailer number on his dispatch ticket or check the tank for cleanliness. Carry was forced to have Etchason drive to a washing facility some forty miles away;

He also admitted arriving late for a pickup on December 18, 1990 (Res. Ex. 5);

Although there is some dispute over whether Etchason was wrong in parking his tractor at his home on December 28, 1990, and the instructions given Etchason by a Carry mechanic, it is not denied that Carry was forced to replace the compressor on the tractor at a cost of approximately $1,000 (Res. Ex. 6). In addition, Etchason admitted that after this incident, he was placed on probation for ninety days after an hour-long disciplinary meeting with Tallaksen and Tamminga;

While it is possible that Etchason's inability to pump a load of corn syrup out of his trailer on January 17, 1991 (Res. Ex. 7) was due mainly to cold weather, it was not denied that the two drivers dispatched to help Etchason were able to pump the syrup out the next day with the pump in question; and,

Although he denies wrongdoing, Etchason admitted that he was banned from returning to Pepsi-Cola after a Pepsi employee called to complain (Res. Ex. 9)[19].

Taking this checkered history into account, I find that Tallaksen was fully justified in terminating Etchason's employment, especially in light of Etchason's finger-pointing and belligerent conduct when Tallaksen called him in to discuss Pepsi's complaint.

Finally, I find it significant that it was Tallaksen who fired Etchason. It was Tallaksen who had resisted Tamminga's attempts to have Etchason fired, and who Etchason characterized as his friend (Tr. 245). Tallaksen cited Etchason's conduct at the March 15th meeting, the Pepsi complaint, and Etchason's performance record as the reasons behind his decision to fire Etchason at the meeting.

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[19] In addition, Etchason dropped a trailer off of the concrete pad on March 13, 1991, two days before he was fired (Res. Ex. 8). However, based on Tallaksen's deposition testimony that he was unaware of this incident when he fired Etchason on March 15th, I find that it was not a factor in the decision to terminate Etchason. See Com. Ex. 14, Tallaksen Depo., at 51-52.

Significantly, Etchason admits that neither he nor Tallaksen mentioned hours of service complaints at any time during the meeting (Tr. 214). Furthermore, it appears that Tallaksen acted alone in deciding to terminate Etchason's employment. Hoekstra and Hoving played no part in the decision to fire Etchason, and Tamminga's involvement was limited to providing Tallaksen with a copy of the Incident Warning Notice concerning the Pepsi complaint.

These considerations lead me to conclude that Etchason has failed to show that the reasons asserted by Carry for his termination were pretextual.

In conclusion, the picture painted at the hearing of Carry's operations during the time of Etchason's employment was an unflattering one. In addition to a company-wide disregard for DOT hours of service regulations, Carry supervisory personnel frequently failed to follow their own procedural regulations. The jurisdictional scope of this inquiry, however, is limited to determining whether Etchason was discharged by Carry in retaliation for his having engaged in protected activity under the STAA.

In evaluating the entire record, I conclude that the overwhelming weight of the evidence demonstrates that the reasons advanced by Carry for the termination of Etchason's employment are legitimate and not pretextual. The credible evidence in this record is susceptible to no conclusion but that Carry would have reached the same employment decision even in the absence of the protected activity in which the Complainant engaged.

## RECOMMENDED ORDER

IT IS RECOMMENDED that the complaint of Clyde Etchason be DISMISSED.

DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE: This Recommended Decision and Order an the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in

employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).